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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

The Honorable RICHARD D. LAMM, Governor of the State of Colorado; JAMES G. RICKETTS, Executive Director of the Colorado Department of Corrections; JOHN PERKO, Director of Adult Services of the Colorado Department of Corrections; EDGAR FOX, Director of the Division of Correctional Industries of the Colorado Department of Corrections; and WILLIAM WILSON, Superintendent of the Canon Correctional Facility,

Petitioners,

v.

FIDEL RAMOS, DAVID LEE ANDERSON, SADIKI LISIMBA AJAMU, (a/k/a Eugene Collins), ALEXANDER ROSES, MARK J. MENCHETTI, LESTER LASENBY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the federal court required to abstain in a "totality of conditions" prison suit when confronted with a state defendant which, prior to initiation of this lawsuit, had voluntarily addressed the problems at its maximum security prison and had moved forcefully and quickly to remedy those problems?

2. What is the proper standard by which to measure the state's obligations under the eighth amendment in a "totality of conditions" prison suit? In particular, did the Tenth Circuit err in finding liability against the State of Colorado on the basis that a prisoner is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being?

PARTIES

The names of all parties to this proceeding are listed in the caption of the case. It should be noted, however, that in the court of appeals eighteen states and one territory joined the State of Colorado as *amici curiae:* Alaska, American Samoa, Arizona, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Nebraska, New Mexico, Ohio, Oklahoma, South Dakota, Utah, Washington and Wyoming.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is not yet reported. A copy of this decision is included in the appendix to this petition (A-1). The opinion of the district court is reported as *Ramos v. Lamm*, 485 F. Supp. 122 (D. Colo. 1979) (A-51).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit issued on September 25, 1980, at which time judgment entered (A-133). Following the filing of petitions for rehearing by both sides, the opinion was modified and the petitions for rehearing were denied on November 10, 1980 (A-137). The jurisdiction of this court is conferred by 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The eighth amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section one of the fourteenth amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C section 1983 states:

> Every person who, under color of any statute, ordi-

nance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1975, over two years before this suit was filed and in the same year that the worst cells at the state penitentiary were upheld as constitutional, *Gregory v. Wyse,* 512 F.2d 378 (10th Cir. 1975), the Attorney General of Colorado, J. D. MacFarlane, at the request of the Governor, conducted an investigation of conditions at the Colorado State Penitentiary. The Attorney General issued a report acknowledging, "With the exception of the new administration building, the prison is antiquated and shows the scars left by generations of neglect, the legacy of our society's past indifference to the fate of its prisoners." The report concluded that "the penitentiary is in trouble and decisive action is mandated now. The reforms are flatly overdue." (Plaintiffs' exhibit 3 at 30, 66.)

The Colorado legislature immediately addressed the problem of reforming the state's system of corrections. In 1976 and 1977 it appropriated over $10 million to build a new "close" security facility[1] and renovate existing structures. It also appropriated $200,000 in planning money for a new maximum security facility. The following year an additional $11.4 million were appropriated to build a new maximum security facility. The Centennial Correctional Facility (maximum security) opened on December 22, 1980. The Shadow Mountain Correctional Facility ("close" security) opened on January 26, 1981. (For a summary of the legislature's actions see defendants' exhibit 1137, A-143.) These facilities are state-of-the-art "modular" prisons designed by

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[1] "Close security" is an intermediate designation between medium security and maximum security. Originally this building was intended to be a medium security facility.

Paul Silver, the architect of the Metropolitan Correctional Center discussed in *Bell v. Wolfish,* 441 U.S. 520 (1979).

The State of Colorado did far more than merely erect two new buildings; it restructured its entire system of corrections. The legislature established a new Division of Correctional Industries to combat idleness and teach job skills and elevated the Department of Corrections to a cabinet level agency. 1977 Colo. Sess. Laws ch. 223 at 903,927. Additionally, the legislature implemented a new system of sentencing, parole, and "good time" laws. *Id.* at 919; 1977 Colo. Sess. Laws ch. 216 at 861,867. See *People v. McKenna,* 611 P.2d 574 (Colo. 1980).

The Department of Corrections also began to implement new policies to effect reform. Dr. Allen Ault, a nationally recognized expert in the field of corrections, became Executive Director of the Department of Corrections in 1977. He immediately introduced new rules and regulations to insure inmate safety, adopted a new classification system (R. vol. 30 at 96), improved food and medical services (R. vol. 30 at 63), instituted a new diagnostic system (R. vol. 30 at 159), and broadened programs (R. vol. 37 at 78). The record is clear that long before this lawsuit was filed, the legislative and executive branches of government were, without judicial intervention, correcting the deficiencies in the state's system of corrections.

On November 30, 1977, Fidel Ramos filed a *pro se* complaint against certain state defendants regarding the conditions of his confinement at the Colorado State Penitentiary, now known as the Canon Correctional Facility (hereinafter CCF) (R. vol. 1 at 2). On January 16, 1978, the defendants (hereinafter the state) filed a motion to dismiss Mr. Ramos' complaint. This motion was denied on February 8, 1978 (R. vol. 1 at 8, 19).

On February 15, 1978, the National Prison Project and the A.C.L.U. Foundation of Colorado entered their appearances and, pursuant to 42 U.S.C. 1983 and 28 U.S.C. sections 1331 and 1343(3), filed a lengthy amended complaint, styled

as a class action, challenging the totality of conditions at CCF (R. vol. 1 at 30). On April 7, 1978, the state filed a motion to dismiss and/or abstain and stay proceedings (R. vol. 1 at 64). This motion was denied (R. vol. 10 at 34). At trial, the state again asked the court to abstain, but it again refused. (R. vol. 42 at 79, 84).

On December 20, 1979, the trial court filed a memorandum opinion and order and, the following day entered judgment against the state under Fed. R. Civ. P. 54(b). In its order, the district court found that the totality of conditions at CCF was unconstitutional. 485 F. Supp. at 133 (A-62). As had the state several years earlier, the court recognized that many of the problems could not be remedied at the old prison, stating: "Every expert who has examined Old Max [CCF] has concluded that it would be both infeasible and uneconomical to renovate Old Max for continued use." 485 F. Supp. at 136 (A-68). The opinion added that because of the design of the old facility, adequate programs or security would be impossible. 485 F. Supp. 136-37, 141 (A-68, 69). Further, the level of health care at CCF was declared inadequate, as were the opportunities for access to the courts and visitation. The degree of idleness at the institution and the classification system utilized by the Department of Corrections were also held unconstitutional. 485 F. Supp. at 156-167 (A-105-108, 110-114). On December 28, 1979, the state filed its notice of appeal (R. vol. 6 at 1245).

On appeal, the Tenth Circuit held that the trial court did not err in refusing to abstain; affirmed the finding that the totality of conditions at CCF was unconstitutional; reversed the findings in the areas of idleness, classification, and visitation; vacated the remedial portions of the order except those portions relating to health; and remanded the case for further hearings (A-49). From this judgment the State of Colorado brings this petition for certiorari.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. ABSTENTION

This case is not the usual "prison conditions" lawsuit in which federal court action was a necessary last resort to

compel reformation of a state prison system. Here, the plaintiffs were latecomers in the process, not initiators of reform. This suit was filed long after the state had decided to replace its maximum security facility; after it had appropriated millions of dollars for the construction of two new prisons to be built according to the most modern prison architecture; and after it had made numerous changes in its prison programs and policies. Given these facts, the federal district court should have refused to hear a "totality of conditions" prison suit.[2]

When the state filed its motion to dismiss and/or abstain, two judicial doctrines came into direct conflict: the "totality of conditions" prison suit, which expanded the exercise of federal jurisdiction and the principle of abstention, which restricted it.

In the last decade the "totality of conditions" prison suit evolved in the federal courts. See Feldberg, *Confronting Conditions of Confinement: An Expanded Role for Courts in Prison Reform,* 12 Harv. Civil Rights - Civil Liberties L. Rev. 367 (1977) (hereinafter "Feldberg"). In such suits the courts do not look at any one particular prison practice but determine whether the overall conditions of confinement constitute cruel and unusual punishment. *Id.* at 369. A "totality of conditions" prison suit not only places the entire prison system on trial, but permits the plaintiffs, if they prevail on liability, to obtain remedial orders which put control of the prisons in the hands of the federal judiciary. *See, e.g., Hutto v. Finney,* 437 U.S. 678 (1978). Trials in such cases are extremely lengthy, require major resources to be

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[2] Not only were the executive and legislative branches proceeding expeditiously, Colorado courts permitted plaintiffs to file actions in state court pursuant to 42 U.S.C. section 1983 to remedy unconstitutional prison conditions. *See Wesson v. Johnson,* 195 Colo. 521, 579 P.2d 1165 (1978). At the time the state argued its motion to dismiss and or abstain, there were at least two such pending actions concerning the penitentiary in which the plaintiffs could have intervened: *Duran v. Lamm,* Denver District Court, Civil Action No. 78-438 and *Morrison v. Lamm,* Denver District Court, Civil Action No. C-66722 (class action). See Colo. R. Civ. P. 24(a). Given the fact that state courts were available to the plaintiffs, abstention was required. *Juidice v. Vail,* 430 U.S. 327 (1977).

expended by the parties and the courts, and have remedial phases which last for years.[3]

At the same time the "totality of conditions" prison suit was developing, this Court decided a series of cases extending the doctrine of abstention — a doctrine which limits the exercise of federal jurisdiction.[4] The development of this doctrine has been consistent with the Court's general concern for the administration of the federal courts, and the relation between the federal and state courts in deciding federal questions. *See, e.g., Stone v. Powell,* 428 U.S. 465 (1976). While the Supreme Court has apparently given its approval to "totality of conditions" prison suits, *see Hutto v. Finney, supra,* at 681, it has never decided the issue of how the doctrine of abstention applies to them.[5] Because of the importance of this issue, it should now be resolved. See Sup. Ct. R. 19(c).

The prior decisions of the Supreme Court require reversal in this case. In *Preiser v. Rodriguez,* 411 U.S. 475, 491-92 (1973), this Court stated:

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[3] The cases arising from Arkansas and Oklahoma provide excellent examples of the protracted nature of prison litigation. See *Holt v. Sarver,* 300 F. Supp. 825 (E.D. Ark. 1969); *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970, *aff'd,* 442 F.2d 304 (8th Cir. 1971); *Holt v. Hutto,* 363 F. Supp. 194 (E.D. Ark. 1973), *modified,* 505 F.2d 194 (8th Cir. 1974); *Finney v. Hutto,* 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd,* 548 F.2d 740 (8th Cir. 1976), *aff'd,* 437 U.S. 678 (1978). *See also, Battle v. Anderson,* 376 F. Supp. 402 (E.D. Okla. 1974), *Battle v. Anderson,* 447 F. Supp. 516 (E.D. Okla.), *aff'd,* 564 F.2d 388 (10th Cir. 1977); *Battle v. Anderson,* 594 F.2d 786 (1979) (an appeal of an unpublished district court opinion); *Battle v. Anderson,* 614 F.2d 251 (10th Cir. 1980) (remanding the case for still further proceedings).

[4] *See Younger v. Harris,* 401 U.S. 37 (1971); *Harris County Commissioners' Court v. Moore,* 420 U.S. 77 (1975); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Hicks v. Miranda,* 422 U.S. 322 (1975); *Carey v. Sugar,* 425 U.S. 73 (1976); *Juidice v. Vail,* 430 U.S. 327 (1977); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Moore v. Sims,* 442 U.S. 415 (1979).

[5] *Compare, Procunier v. Martinez,* 416 U.S. 396 (1974), in which the Court held that abstention was not appropriate where the suit was brought solely to enforce first amendment rights.

> It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eyes of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. . . . Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. . . . *The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.*

(emphasis added).

In *Colorado River Water Conservancy District v. United States,* 424 U.S. 800, 814 (1976), the Court held that abstention may be required where important matters of state policy are concerned, stating:

> It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

See also, Burford v. Sun Oil Co., 319 U.S. 315 (1943). Read together, these decisions strongly support Colorado's position that abstention was required in this case. *Preiser* establishes that the state's interest in the administration of its prisons is of the highest order and mandates that it be given the first opportunity to remedy any errors. *Colorado River Water* establishes that where a matter is of substantial public concern, comity requires that the federal court refrain from disrupting the state's efforts to establish a coherent policy. Since the district court's failure to abstain has been

disruptive of the State of Colorado's efforts to establish a new system of corrections, abstention was required.

The potential for disruption of state systems of corrections is always present in "totality" suits because of their all-encompassing nature. Courts, however, have ignored the potential disruptive impact of such suits because they were seen as a necessary response to situations in which the legislative and the executive branches of government refused to devote resources to improving the living conditions of the incarcerated. Feldberg, *supra,* at 369. *See generally,* Comment, *The Role of the Eighth Amendment in Prison Reform,* 38 U. Chi. L. Rev. 647 (1971). Indeed, such suits are advocated precisely because they are likely to spur the executive and legislative branches to action.[6] Where, as here, government needs no prodding, the policy basis for "totality of conditions" prisons suits is utterly lacking.

The failure of the district court to abstain in a situation where the state was already reforming its own system of corrections has the ironic and disturbing effect of providing the states with a disincentive to voluntarily reform their own prisons. Much of the evidence introduced by the plaintiffs to prove their case was the result of the state's efforts to investigate the shortcomings of its correctional system. For example, plaintiffs' exhibit 1 was a 1977 study (commissioned by the state) which recommended building a new prison. Plaintiffs' exhibit 2 was the 1978 five-year plan which was prepared by the Department of Corrections. This plan identified deficiencies in the then-existing system of corrections and contained plans to change them. Plaintiffs' exhibit 3 was the report of the Colorado Attorney General calling for prison reform. The plaintiffs also relied upon the legislative testimony of the Executive Director of the Department of Corrections. This testimony, which was given to

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[6] Feldberg, *supra,* at 403. *Accord,* Bronstien, *Reform Without Change: The Future of Prisoners' Rights,* 4 Civil Liberties Rev. No. 3 27 (1977); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform,* 57 U. Va. L. Rev. 841, 884 (1971); Robbins, *Federalism, State Prison Reform, and Evolving Standards of Human Decency: On Guessing, Stressing, and Redressing Constitutional Rights,* 26 Kan. L. Rev. 551, 562 (1978).

obtain funding for the new prisons, contained a frank assessment of the conditions at the old facility. (*See, e.g.*, R. vol. 30 at 116-17.)

The failure of the federal courts to abstain in cases in which the state government is remedying the problems which exist in its prisons will discourage the states from generating self-critical reports, discussing correctional problems in public, and implementing reforms before being sued. Such voluntary actions should be strongly encouraged and the application of abstention will affirmatively promote this result.

B. THE CONSTITUTIONAL STANDARD

This case presents another major issue of first impression to this Court: What are the proper parameters of the eighth amendment in prison cases? Not only was federal jurisdiction erroneously invoked in this case, but once invoked, the test used to measure the state's liability under the eighth amendment by the district court and the court of appeals was erroneous.

This issue is critical to the states. As of February 1980, prison litigation was pending in 32 states. National Association of Attorneys General, *Implementation of Remedies in Prison Conditions Suits*, 49-51 (1980). The threat of prison or jail litigation exists in virtually every jurisdiction. Yet, to date, the Supreme Court has not stated what the standard of liability is to be in such suits. This presents problems not only for litigants, but to the state governments, who, if given an objective measure of their liabilities, will be able to plan in such a way as to avoid the necessity of litigation. Since the executive branch of government is in a far better position than the courts to effect meaningful prison reform, it is particularly important that the Court establish a standard by which to measure the states' obligations in the administration of their prisons.[7]

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[7] In *Bell v. Wolfish*, 441 U.S. 520 (1979), this Court emphasized that, "the operation of our correctional facilities is peculiarly within the province of the Legislative and Executive Branches of Government, not the Judicial." *Id.* n. 30 at 548. *Accord, Procunier v. Martinez*, 416 U.S. 397, 404-05 (1974).

This case is the logical sequel to this Court's decision in *Bell v. Wolfish, supra.* In *Wolfish* the Court reversed the Second Circuit which held, *inter alia,* that the conditions of confinement of certain pre-trial detainees (as distinguished from convicted prisoners) were unconstitutional. The basis of the Court's decision was that the standard used by the Second Circuit to measure the government's liability under the fifth amendment's due-process clause did not have a "source in the Constitution." *Id.* at 532. Because the Second Circuit had already reversed that part of the district court's opinion dealing with convicted prisoners, the Court was not presented with the issue of eighth-amendment standards. This case squarely presents that issue.[8]

At all phases of the lawsuit the parties have disagreed over what standard should be applied to measure the state's obligations. Colorado has consistently argued for the narrow, objective standard first enunciated in *Newman v. Alabama,* 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978), in which the court held:

> If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety so as to avoid the imposition of cruel and unusual punishment, that ends its obligation under Amendment Eight.

This standard has been adopted by the Second and Fourth Circuits, *Wolfish v. Levi,* 573 F.2d 118 (2d Cir. 1978), *rev'd in part on other grounds, Bell v. Wolfish,* 441 U.S. 520 (1979); *Hite v. Leeke,* 564 F.2d 670 (4th Cir. 1977), and has been quoted in dicta by this Court in *Bell v. Wolfish, supra,* n.11 at 529.

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[8] While both the district court and the court of appeals utilized the degeneration test in ruling for the plaintiffs, the district court noted that the courts had used various standards to measure liability in prison actions brought pursuant to 42 U.S.C. section 1983, 485 F. Supp. at 153-54, n. 20 (A-99, 100). In an attempt to avoid defining an eighth amendment standard, the court stated that "I find the conditions of confinement at the Canon Correctional Facility meet all tests [of liability] by all known measures of proof." *Id.* This of course is no standard, and provides the state with no guidance as to how to avoid future liability.

The plaintiffs, in contrast, have argued for the broader test first enunciated by the Tenth Circuit in *Battle v. Anderson*, 564 F.2d 388, 403 (10th Cir. 1977), in which the court held: "We believe that while an inmate does not have a federal constitutional right to rehabilitation, he is entitled to be confined in an environment which does not result in his degeneration or which threatens his mental and physical well being." In the case at bar, the Tenth Circuit adhered to its degeneration test and held that it was not inconsistent with the *Newman* standard (slip opinion at 13, 15 (A-13, 16)), despite the fact that the *Newman* court specifically rejected the "degeneration" argument, referring to it as an "uncharted bog." 559 F.2d at 291. To date, no other circuit court has adopted the "degeneration" test, although it recently has been used by a federal district court in *Capps v. Atiyeh*, 495 F. Supp. 802 (D. Ore. 1980).

If the "degeneration" test is to be utilized by the federal courts in determining liability, the states will have little chance of successfully defending themselves against "totality" suits. As the *Newman* court noted, *"The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it."* 559 F.2d at 291 (emphasis added). If there is no power on earth to prevent deterioration, prison conditions in even the most modern prisons will render degeneration not only probable, but certain. Under this subjective test, liability cannot be avoided.

This Court should not permit the lower courts to utilize the degeneration test in "totality of conditions" prison litigation. The test is completely subjective. Liability will not be based upon a state's refusal to comply with clearly-defined constitutional criteria, but on the particular views of penology held by the trial judge.

In *Bell v. Wolfish*, *supra*, at 562, the Court warned that many courts have in recent years, "in the name of the Constitution become increasingly enmeshed in the minutiae of prison operations." The Court added that the reason for this trend was that judges "have a natural tendency to believe that their individual solutions to often intractable problems

are better and more workable than those of persons who are actually charged with and trained in the running of a particular institution under examination." *Id.*

The use of the degeneration test magnifies this problem. Under this test, when a judge sees prison programs which differ from those he favors, and when he sees degeneration (as he always will), he is free to declare the conditions at the prison unconstitutional. Because the degeneration test contains virtually no constraints on the ability of the federal courts to impose their concepts of penology on the states, it must be replaced by an objective standard by which the state's conduct can be measured. As the Fifth Circuit has stated, "The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which *some person* may think is needed to avoid mental, physical, and emotional deterioration." *Newman v. Alabama, supra,* 291. (emphasis added).

Nor is the definition of the eighth amendment standard an academic issue. Prison conditions in Colorado have improved dramatically since the date of trial. The Tenth Circuit did not stay those portions of the district court's order dealing with medical care. The state has, largely, solved the medical problems which existed. The move to the new prisons will remedy most of the deficiencies found by the district court in the areas of physical facilities, personal safety, food, and sanitation. If this lawsuit were brought today and tried under an objective legal standard, the facts would not support a finding of unconstitutional conditions. Nevertheless, Colorado remains under federal judicial scrutiny and continues to be held to the degeneration test — a test which neither fairly measures liability nor sets goals which are possible to attain.

CONCLUSION

This case presents two issues which should be, but have not been, decided by the Court. Because of the importance of these issues and the large number of "totality of conditions" prison cases which are pending in the federal courts, the state asks this Court to issue a writ of certiorari.

Respectfully Submitted,

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